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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AGAPITO ASUNCION-DIAZ, Defendant.	Criminal Case No. 08CR681-W **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:** **(1) COMPEL DISCOVERY AND PRESERVE EVIDENCE;** **(2) SUPPRESS STATEMENTS** **ALONG WITH UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY.** Date: April 21, 2008 Time: 2:00 p.m.

Plaintiff, United States of America, by and through its counsel, Karen P. Hewitt, United States Attorney, and Christina M. McCall, Assistant United States Attorney, hereby files its Response and Opposition to Defendant's Motions and its Motion for Reciprocal Discovery. This Response and Opposition is based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

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I

STATEMENT OF FACTS

A. Defendant's Criminal History

Defendant, Agapito Asuncion-Diaz, is 41 years old. His criminal record is lengthy. In 1994, Defendant was convicted of possession of a controlled substance for sale, a felony. In 1995, Defendant was convicted of petty theft. In 1996, Defendant was convicted of battery. In 2004, Defendant was convicted of possession of a controlled substance and petty theft. In 2006 and in 2007 he was convicted of possession of a controlled bubstance.

B. Defendant's Apprehension

On February 24, 2008, Defendant drove into the Calexico West Port of Entry. Accompanying Defendant was a passenger, Robert A. Escobedo. Defendant was the registered owner of the 1993 Chevrolet Silverado with California license plates. The Silverado was towing a 2008 Eagle trailer, also with California license plates. At around 5:20 p.m., Defendant drove his vehicle and trailer into primary inspection lane one.

Defendant and Escobedo claimed to be United States citizens by birth. Defendant showed the inspector a birth certificate from California and a driver's license. Escobedo showed a birth certificate and a temporary California identification card. During the primary inspection procedure, both Defendant and Escobedo avoided eye contact. Defendant seemed to be scanning his surroundings while Escobedo proceeded to eat and pay no attention to the inspection. When the inspector asked Defendant how long he had owned the 2008 trailer, Defendant claimed he had owned the new trailer for three years. The inspector examined the trailer and noticed a depth discrepancy in the back wall of the trailer. At this point, officers escorted Defendant and Escobedo into the security office.

A detector dog alerted to the right side of the trailer. Inside the trailer, besides a false compartment, were Mexican wrought iron pieces of art. After removing the trailer's outside panel, officers could immediately notice large packages. Officers removed 26 large packages from the compartment in the trailer, containing a green leafy substance that field-tested positive for marijuana. The packaging consisted of layers of cellophane, carbon paper, laundry soap powder, grease, and tin foil. The gross weight of the marijuana packages was 336 kilograms or 738 pounds.

At 11:45 p.m., Immigration and Customs Enforcement ("ICE") agents advised Defendant of his Miranda rights. Defendant acknowledged each of his rights and agreed to answer questions about the offense. During the course of the interview, Defendant avoided eye contact and gave short, unclear answers. Defendant said that he was hauling the trailer as a favor to his friend Oscar. Oscar asked Defendant to pick up the trailer and drive it to Coachella, California. Defendant said that Oscar called him on Friday, February 20, to ask if he was ready to drive to Mexico to bring the trailer into the United States. Defendant stated that he told Oscar he was not ready, but would be available on Sunday, February 22.

Defendant stated that he drove into Mexico with Escobedo to pick up the loaded trailer at an unknown location in Mexico. Defendant said that, after picking up the trailer, the two men went to eat, then washed the trailer and drove to the port of entry. Defendant said that he negotiated over the telephone with an unknown man about transporting this trailer. Defendant said that he would be paid $500 United States dollars plus gasoline expenses to drive the trailer from Mexico to Coachella. Defendant also indicated that the unknown man also offered to give him the 2008 trailer after the delivery was complete. Defendant claimed that his mother purchased the Silverado truck for him. Despite the suspicious details about how he encountered the trailer, Defendant claimed that he did not know there was marijuana inside the trailer. In Defendant's possession were two itemized sheets from a decorative furniture company in Mexico, apparently for $381 and $410 in what appeared to be United States currency.

On March 5, 2008, a federal grand jury for the Southern District of California returned a two-count Indictment against Defendant, charging him with: knowingly importing 335 kilograms of marijuana, and possessing, with intent to distribute, 335 kilograms of marijuana, in violation of Title 21 U.S.C. §§ 952 and 841.

II

UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS

A. ORDER COMPELLING DISCOVERY IS UNNECESSARY

No Order is Required; The United States is Complying With Discovery Obligations

______The United States has produced 89 pages of discovery as of the filing of this response, as well as a digital video recording of Defendant's post-arrest Miranda statements. The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jenks Act (18 U.S.C. §3500), and Federal Rule of Criminal Procedure 16. Because the United States has complied and will comply with its discovery obligations, an order to compel discovery is unwarranted and the request for such an order should be denied.

1. Defendant's Statements

Defendant has already been provided with copies of reports detailing his statements prior to being taken into custody. Additionally, Defendant has a video recording of his post-arrest statements.

2. Scientific Reports

In sufficient advance of trial, once the chemical laboratory analysis results are complete, the analysis report will be turned over as discovery.

3. Brady Material

The United States will comply with its obligations to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963). Under Brady and United States v. Agurs, 427 U.S. 97 (1976), the government need not disclose "every bit of information that might affect the jury's decision." United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980). The standard for disclosure is materiality. Id. "Evidence is material under Brady only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense." United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001). Impeachment evidence may constitute Brady material "when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (internal quotation marks omitted).

4. Information that May Result in a Lower Sentence

This request is unsupported by any case law or statute.

5. Defendant's Prior Criminal Record

The United States has already provided copies of Defendant's rap sheet, and some evidence of state court criminal convictions.

7. Evidence Seized

The United States has complied and will continue to comply with Fed. R. Crim. P. 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized that is within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. However, the bulk marijuana in this case will be destroyed, pursuant to the Code of Federal Regulations. Defense counsel was notified in advance of the destruction of the bulk marijuana. The samples have been preserved.

The United States need not, however, produce rebuttal evidence in advance of trial. United States v. Givens, 767 F.2d 574, 583-84 (9th Cir. 1984).

8. Preservation of Evidence

The United States will preserve all evidence to which the defendant is entitled to pursuant to the relevant discovery rules. The United States objects to a blanket request to preserve all physical evidence, especially because defense counsel indicated that preserving the bulk marijuana would have no impact on Defendant's sentencing if he is convicted.

9. Tangible Objects

The United States has complied and will continue to comply with Fed. R. Crim. P. 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant.

10, 11, 12, 13, 17, 18, 19, 20. Giglio/Henthorn Information

The United States will comply with the requirements of Giglio v. United States, 405 U.S. 150 (1972) and United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) by having agencies conduct a review of government agents' personnel files in advance of trial.

14. Witness Addresses

The United States will provide the names of the witnesses it intends to call at trial. Defendant has already received access to the names of potential witnesses through the discovery sent to his counsel. The United States objects to Defendant's request for witness addresses. None of the cases cited by

Defendant, nor any rule of discovery, requires the United States to disclose witness addresses. The United States does not know of any individuals who were witnesses to Defendant's offenses except the law enforcement agents who apprehended him. The names of these individuals have already been provided to Defendant.

15. Witnesses Favorable to Defendant

As indicated above, the United States will comply with its discovery obligations to produce information that is exculpatory to Defendant, although it has discovered no such information as of this date. To the extent that it discovers such information, the United States will provide information about witnesses who made favorable statements about Defendant.

16. Statements Relevant to the Defense

Unless Defendant indicates which defense he is pursuing, it is incredibly difficult to determine any statement that might be relevant to any possible defense or contention that he might assert, and not required unless such statement qualifies as Brady materials. A videotape of Escobedo's post-arrest interview has been turned over.

17. Jencks Act Material / Statements

The United States has or will comply with the disclosure requirements of the Jencks Act. For purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). Notes of an interview only constitute statements discoverable under the Jencks Act if the statements are adopted by the witness, as when the notes are read back to a witness to see whether or not the government agent correctly understood what the witness was saying. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). By the same token, rough notes by an agent "are not producible under the Jencks Act due to the incomplete nature of the notes." United States v. Cedano-Arellano, 332 F.3d 568, 571 (9th Cir. 2004).

21. Expert Witnesses

The United States will comply with Fed. R. Crim. P. 16(a)(1)(G) and provide Defendant with notice and a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence.

22. A-file Access

As a United States citizen by birth who has never been arrested for alien smuggling, Defendant would not have an alien file.

B. DEFENDANT'S STATEMENTS SHOULD NOT BE SUPPRESSED

1. Defendant's Motion Should be Denied Without a Hearing

Contrary to Defendant's request, the Court should deny the motion to suppress without a hearing. Under Ninth Circuit precedent and Southern District Local Criminal Rule 47.1(g)(1), a defendant is entitled to an evidentiary hearing on a motion to suppress only when the defendant puts forth, in a declaration, sufficient facts to require a factual finding. United States v. Batiste, 868 F.2d 1089, 1098 (9th Cir. 1989) ("defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, . . . the district court was not required to hold an evidentiary hearing."). "A hearing will not be held on a defendant's pretrial motion to suppress merely because a defendant wants one. Rather, the defendant must demonstrate that a 'significant disputed factual issue exists such that a hearing is required.'" United States v. Howell, 231 F.3d 615, 621(9th Cir. 2000) (citations omitted).

Here, Defendant has failed to support his allegations with a declaration, in clear opposition to Local Rule 47.1(g). Defendant also fails to provide any factual support that a violation of Miranda occurred. This Court should deny Defendant's motion to suppress the statements he made to officials on the day of his arrest.

2. The Agents Complied With Miranda

Defendant was informed of the Miranda rights. It is difficult to see what is wrong with the prophylactic protections phrased almost identically to those in the Miranda case itself. This warning is not defective. Defendant signed the "statement of rights" form, and initialed each of the rights that were read to him, before speaking about the offense.

3. Defendant Knowingly, Voluntarily and Intelligently Waived His Rights

The case agent read the Miranda warnings to Defendant. Defendant signed the waiver form and wrote his initials next to each of the enumerated rights. The environment was free of physical intimidation; Defendant was not handcuffed during the interview, which took place in a well-lit room with two plain-clothes agents present. The length of detention preceding the post-arrest interview was within the six hours deemed presumptively voluntary. Before starting the interview, the agents offered Defendant access to the restroom facilities and provided drinking water to him. Nothing about this routine post-arrest interview suggests that Defendant was forced to make statements. All the evidence indicates that Defendant knowingly, voluntarily, and intelligently waived his rights. His statements should be admitted.

III

UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

Defendant has invoked Fed. R. Crim. P. 16(a) and the United States has voluntarily complied with the requirements of Rule 16(a). Therefore, provision 16(b) of that rule, requiring reciprocal discovery, is applicable. The United States hereby requests Defendant to permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody or control of Defendant and which he intends to introduce as evidence in his case-in-chief at trial.

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which he intends to introduce as evidence-in-chief at the trial or which were prepared by a witness whom Defendant intends to call as a witness. The United States also requests that the court make such orders as it deems necessary under Rule 16(d)(1) and (2) to insure that the United States receives the discovery to which it is entitled.

Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all witnesses, except Defendant. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. The United States hereby requests that Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes and/or reports.

V

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motions, except where not opposed, be denied and the United States' motion for reciprocal discovery be granted.

DATED: April 17, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Christina M. McCall

CHRISTINA M. McCALL
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. AGAPITO ASUNCION-DIAZ, Defendant.	Case No. 08CR681-W **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that:

I, CHRISTINA M. McCALL, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101.

I am not a party to the above-entitled action. I have caused service of RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCOVERY on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

John Kirby, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 17, 2008.

/s/ Christina M. McCall
CHRISTINA M. McCALL